91-1192

No. _____

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1991

LAKE AT LAS VEGAS INVESTORS GROUP, INC.,

Petitioner,

v.

TRANSCONTINENTAL CORPORATION, TRANSNEVA CORPORATION and TRANSNEVA LIMITED PARTNERSHIP,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does the "two dismissal exception" of Fed.R.Civ.P. 41(a)(1), providing that two voluntary dismissals operate as an adjudication upon the merits, eliminate all judicial discretion to effectuate the policy of the "exception" and mandate mechanical termination of a plaintiff's rights *with prejudice* regardless of the circumstances surrounding the prior dismissals?

2. In a diversity action, may a federal court create a federal rule as to the res judicata effect of a prior judgment which conflicts with the law of the state in which the court is sitting?

3. Where a plaintiff has had *no* trial on the merits of a claim and judgment has been awarded to a defendant *solely* on the basis of the "two dismissal exception" of Fed.R.Civ.P. 41(a)(1), does res judicata bar plaintiff from pursuing an action based on the same claim against a different defendant not in privity with the judgment-holder?

PARTIES

Petitioner (appellant below) is Lake at Las Vegas Investors Group, Inc. It has no parent or subsidiary company.

Respondents (appellees below) are Transcontinental Corporation, its wholly-owned subsidiary Transneva Corporation, and Transneva Limited Partnership. Petitioner does not know of any parent company of Transcontinental Corporation or of any other non-wholly owned subsidiary companies of respondents.

Other parties to the district court action are Pacific Malibu Development Corporation, Barry Silverton, Lake at Las Vegas Joint Venture, Botaba Realty Company, BSF Partners, Sid R. Bass, Robert M. Bass, Lee M. Bass and Ronald F. Boeddeker.

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Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

Lake at Las Vegas Investors Group, Inc. petitions for a writ of certiorari to review the judgment and Opinion of the United States Court of Appeals for the Ninth Circuit entered on May 13, 1991, and amended on August 23, 1991.

OPINIONS BELOW

The original Opinion of the Ninth Circuit is reported at 933 F.2d 724, and appears in the Appendix hereto at

pp. A-1 - A-12. The Order and Amended Opinion of the Ninth Circuit on Rehearing appears in the Appendix hereto at pp. A-13 - A-25. The Order of the Ninth Circuit denying a Renewed Petition for Rehearing appears in the Appendix hereto at p. A-40. The Opinion of the District Court is not reported but appears in the Appendix hereto at pp. A-26 - A-35. The Opinion of the District Court denying reconsideration is not reported, but appears in the Appendix hereto at pp. A-36 - A-39.

JURISDICTION

The judgment of the Ninth Circuit was entered on May 13, 1991. Following a Petition For Rehearing And Suggestion Of Rehearing En Banc, the Ninth Circuit issued an Amended Opinion on August 23, 1991. A Renewed Petition For Rehearing And Suggestion Of Rehearing En Banc was denied on December 2, 1991. The Honorable Justice Sandra Day O'Connor entered Orders on October 23, 1991 and November 26, 1991 extending until January 20, 1992 the time for filing this Petition. Jurisdiction to review the judgment in question by writ of certiorari is conferred on this Court by 28 U.S.C. § 1254(1).

PROCEDURAL RULE INVOLVED

The pertinent part of Fed.R.Civ.P. 41 provides:

Rule 41. Dismissal of Actions

(a) Voluntary Dismissal: Effect Thereof.

> **(1) By Plaintiff; by Stipulation.** Subject to the provisions of Rule 23(e), of Rule 66, and of any statute of the United States, an action may be dismissed by the plaintiff without order of court (i) by filing a notice of dismissal at any time before service by the adverse party of an answer or of a motion for summary judgment, whichever first occurs, or (ii) by filing a stipulation of dismissal signed by all parties who have appeared in the action. Unless otherwise stated in the notice of dismissal or stipulation, the dismissal is without prejudice, **except that** a notice of dismissal operates as an adjudication upon the merits when filed by a plaintiff who has once dismissed in any court of the United States or of any state an action based on or including the same claim. (Emphasis added.)

CONSTITUTIONAL PROVISION INVOLVED

The pertinent part of the Fifth Amendment of the United States Constitution provides:

> No person shall . . . be deprived of life, liberty, or property, without due process of law; . . .

STATUTE INVOLVED

Nevada Revised Statute 80.210(1), referenced herein but not before this Court for review or interpretation, provided, prior to an amendment in 1989 which is not relevant here, as follows:

> Every corporation which fails or neglects to comply with the provisions of NRS 80.010 to 80.040, inclusive, shall be subject to a fine of not less than $500, to be recovered in a court of competent jurisdiction, and shall not be allowed to commence, maintain or defend any action or proceeding in any court of this state until it shall have fully complied with the provisions of NRS 80.010 to 80.040, inclusive.

STATEMENT OF THE CASE

On October 9, 1987, petitioner Lake at Las Vegas Investors Group, Inc. ("Investors") filed a Complaint in Nevada state court for **hundreds of millions of dollars in damages** for breach of and tortious interference with its contractual rights in the development of a billion dollar lakefront, multi-casino/hotel resort near Las Vegas, Nevada.

Upon learning that Investors had not registered to do business in Nevada before the Complaint was filed, as required by Nevada law, Investors' former counsel caused Investors to register, filed a Notice of Dismissal *without prejudice* and immediately commenced this action by filing the *identical* Complaint in Nevada state court under a new action number. Just six days elapsed between the filing of the first Complaint and the filing of this action. **The first Complaint was never served on defendant Transcontinental Corporation ("Transcontinental") or any of the other defendants.**

Asserting **diversity** (28 U.S.C. § 1332(a)), certain defendants removed this action to the United States

District Court for the District of Nevada. Shortly thereafter, **with Transcontinental still not having been served**, Investors' former counsel filed a Notice of Dismissal under Fed.R.Civ.P. 41(a)(1) **as to Transcontinental only** and, on the same day, a Motion To Amend Complaint under Fed.R.Civ.P. 15 seeking leave, *inter alia*, to withdraw all of Investors' claims against Transcontinental.[1] That motion was granted a few days later.

Months later, Investors, represented by new counsel, was granted leave to amend its Complaint, *inter alia*, to reinstate Transcontinental as a defendant, and to add Transneva Corporation and Transneva Limited Partnership ("Transneva Defendants") as defendants.[2] *Investors had not previously sued either of the Transneva Defendants.*

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[1] Investors' contract was with defendants Pacific Malibu Development Corporation and Barry Silverton, who had had sole rights to the project. Pacific Malibu and Silverton were required to commence development before the end of 1987 or a vital permit would have expired and destroyed the project. To remove impediments to commencement of development, Investors' Motion To Amend Complaint withdrew all claims for injunctive and declaratory relief and specific performance. Transcontinental had not yet closed on the acquisition of rights to the project from Pacific Malibu and Silverton. Thus, Investors dropped Transcontinental as a party because a claim against it for damages had not yet ripened. However, the Notice of Dismissal as to Transcontinental expressly stated that it was without prejudice.

[2] The amendment was necessary because Transcontinental had caused Transneva Limited Partnership to enter into a joint venture with Pacific Malibu to acquire rights in the project. This subsequent conduct gave rise to Investors' causes of action against Transcontinental and the Transneva Defendants. Transneva Corporation is a wholly-owned subsidiary of Transcontinental and the general partner of Transneva Limited Partnership.

Transcontinental then moved for summary judgment on the ground of res judicata (claim preclusion), arguing that its dismissal in this action constituted the second dismissal of an "action" and operated as an adjudication upon the merits under the "two dismissal exception" of Fed.R.Civ.P. 41(a)(1). The Transneva Defendants also moved for summary judgment, erroneously contending that they were privies of Transcontinental entitled to the res judicata protection of its judgment.

Without affording Investors any opportunity to present its evidence on the merits of its claims against Transcontinental or the Transneva Defendants, the District Court granted summary judgment, and certified its Order as final under Fed.R.Civ.P. 54(b) on November 13, 1989. A notice of appeal was filed on November 21, 1989.

On May 13, 1991, a Panel of the Ninth Circuit held, **in direct conflict** with a decision of the Second Circuit, that the "two dismissal exception" of Rule 41(a)(1) depriving a party of its day in Court must be mechanically applied without "consider[ing] the plaintiff's reasons for seeking a voluntary dismissal" (A-7) or "inquir[ing] into the circumstances of the two dismissals." (A-8)

In apparent conflict with the doctrine of *Erie R. Co. v. Tompkins*,[3] and *in direct conflict* with decisions of other Circuits applying that doctrine, the Panel then **decided as a matter of federal law** that the Transneva Defendants,

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[3] 304 U.S. 64 (1938). The *Erie* doctrine requires federal courts in diversity cases to apply the substantive law of the state in which the court sits.

even though not privies of Transcontinental, were entitled to the res judicata protection of Transcontinental's judgment. In conflict with Nevada law, the Panel rejected *any* requirement of privity and **created a federal rule** for applying res judicata based upon a "substantial relationship" with the judgment-holder.[4] Thus, the Transneva Defendants were held to have a "substantial" enough "relationship" to Transcontinental to come within the res judicata bar of its judgment. (A-10 - A-11)

In response to Investors' Petition for Rehearing, the Panel filed an Amended Opinion substituting a new conclusion that privity was "inapplicable" because the Transneva Defendants are "substantially the same [as Transcontinental] for purposes of Rule 41(a)(1)". (A-14, A-23 - A-24) Although that revision did not eliminate conflict with Nevada law or even address other errors, the Ninth Circuit denied Investors' Renewed Petition for Rehearing without addressing the significant issues raised by its Opinion and Amended Opinion.

REASONS FOR GRANTING THE WRIT

The Opinion and Amended Opinion of the Ninth Circuit raise the following three nationally important and recurring issues:

1. Whether, in the interest of justice, a federal court has discretion to consider the motivation and effect of prior dismissals when applying the "two dismissal exception" of Rule 41(a)(1). The Ninth Circuit's decision that

[4] Nevada law extends res judicata *only* to the privies of the judgment-holder. See footnote 10 at page 13, *infra*.

the "exception" must be mechanically applied does not comport with the policy underlying the "two dismissal exception" and **is in conflict** with a decision of the Second Circuit;

2. Whether a federal court sitting in a diversity action must apply state law in determining the res judicata effect on third parties of a judgment in a prior diversity action. This Court has left that specific issue undecided, but the Ninth Circuit's creation of a federal rule conflicting with state law adds to the widespread **split among the Circuits** as to the correct application of the *Erie* doctrine on the issue of res judicata and promotes forum shopping; and

3. If the answer to issue no. 2 is that federal law governs, whether the res judicata bar of a judgment can be extended to non-privies of the judgment-holder consistent with federal policy and due process of law. In apparent conflict with (a) the policies articulated by this Court in decisions abolishing a strict mutuality of estoppel requirement in collateral estoppel cases, and (b) the due process rights of a plaintiff who *never* was afforded any opportunity to present its evidence on the merits of a claim against any defendant, the Ninth Circuit's Opinion extends the abolition of the requirement of mutuality of estoppel to res judicata cases.

I. The Ninth Circuit And The Second Circuit Are In Conflict On The Interpretation And Application Of The "Two Dismissal Exception" Of Federal Rule Of Civil Procedure 41(a)(1).

The policy behind the "two dismissal exception" of Fed.R.Civ.P. 41(a)(1), which provides that a second

voluntary dismissal operates as an adjudication upon the merits, is to deter abuse or harassment of defendants by the filing and voluntary dismissal of successive actions based on or including the same claim. *Cooter & Gell v. Hartmarx Corp.*, ___ U.S. ___, 110 S.Ct. 2447, 2456-57 (1990); *Poloron Products, Inc. v. Lybrand Ross Bros. & Montgomery*, 534 F.2d 1012, 1017 (2d Cir. 1976). The Ninth Circuit's mechanical application of the "two dismissal exception" conflicts not only with the policy underlying the "exception" itself, but also with the Second Circuit and with the fundamental purpose and spirit of the Federal Rules which were drafted to achieve justice through fair trials rather than by summary dismissals. *Surowitz v. Hilton Hotels Corp.*, 383 U.S. 363, 373 (1966); Fed.R.Civ.P. 1.

The Ninth Circuit's holding that it is irrelevant whether a plaintiff who twice files a notice of dismissal intended to or actually harassed the defendant, or what the circumstances were surrounding the filings, is squarely and irreconcilably in conflict with the Second Circuit's decision in *Poloron Products, Inc. v. Lybrand Ross Bros. & Montgomery, supra*. There, a first action was dismissed by stipulation signed by all parties, and a second by a notice of dismissal filed by Poloron before a responsive pleading had been served.[5] When Poloron commenced a third action based on the same claim, defendant moved to dismiss on grounds that the second dismissal operated as an adjudication on the merits under Rule 41(a)(1). The district court mechanically applied the "two

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[5] With regard to a first dismissal, the "two dismissal exception" makes no distinction between dismissal by stipulation and dismissal by notice.

dismissal exception" and held the action barred by res judicata.

The Second Circuit *agreed* that literal application of the "exception" would mandate affirmance of the district court's Order, *but nonetheless reversed*, holding that federal courts should exercise discretion and not mechanically apply the "exception" where it would neither further the policy underlying the "exception" nor be in the interest of justice. *Id.*, 534 F.2d at 1017-18.

Adoption by this Court of the Second Circuit's view would require reversal here. Investors neither intended to abuse nor actually abused Respondents. The uncontradicted affidavit of Investors' former counsel revealed that he believed the first notice of dismissal was *compelled* by virtue of Nevada Revised Statute 80.210(1) providing that an unregistered corporation "shall not be allowed to commence . . . any action or proceeding in any court of the state until it shall [register to do business]". Nevada case law also holds that the filing of a complaint by an unregistered corporation is a nullity that cannot be cured by registration.[6] Even the district court observed that the first dismissal was "mandated by Nevada law" (A-34) which "forbids [an unregistered] corporation to bring an action in its courts". (A-31) However, both the district court and the Ninth Circuit concluded that the reason for filing the notice was irrelevant.

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[6] If the unauthorized filing of the first complaint did not commence an "action", its dismissal would not have been the dismissal of an "action", and the "*two* dismissal exception" would be inapplicable. The Nevada Supreme Court held in

(Continued on following page)

The second notice of dismissal (as to Transcontinental only) also was not for the purpose of abuse or harassment, but rather was because a claim against Transcontinental had not yet ripened.[7] Moreover, it was undisputed below that at the time the second notice of dismissal was filed, Transcontinental had not even been served with process. Thus, not only was there indisputably no intent to abuse or harass Transcontinental by the filing of the dismissals, there was no actual abuse or harassment.

Blind and mechanical application of the "two dismissal exception" serves no legitimate purpose or policy. It has resulted here in nothing but a trap for the unwary, unconscionably depriving Investors of its day in court because of an innocent procedural misstep by its former

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(Continued from previous page)

League to Save Lake Tahoe v. Tahoe Regional Planning Agency, 93 Nev. 270, 275, 563 P.2d 582, 585 (1977), that the filing of a complaint by an unregistered corporation does not toll the statute of limitations, adopting the holding of an Alaska Supreme Court case that the filing of a complaint in violation of a similar provision of Alaska's Corporation Act was *not the commencement of an "action"*. Nonetheless, the Ninth Circuit stated that Nevada law does not provide a clear answer whether the filing of a complaint by an unregistered corporation was the commencement of an action. (A-5) Astoundingly, however, the Ninth Circuit then provided its own answer, *without reference to Nevada law*, that the filing even of an unauthorized complaint *is* the commencement of an "action". (A-6) In creating its own answer rather than determining how the Nevada Supreme Court would answer that question, the Ninth Circuit disregarded 53 years of this Court's jurisprudence under *Erie R. Co. v. Tompkins*, *supra*.

[7] See footnotes 1 and 2 on page 5, *supra*.

counsel. Such a mechanistic approach contravenes not only the direction of Fed.R.Civ.P. 1 that the Federal Rules "shall be construed to secure the just, speedy and inexpensive determination of every action," but the principle enunciated in *Foman v. Davis*, 371 U.S. 178, 181-82 (1962), that a decision on the merits should not be denied on the basis of a procedural misstep of counsel.[8]

The proper interpretation of the "two dismissal exception" is a recurring issue.[9] Review by this Court is necessary to achieve uniformity.

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[8] If Investors' former counsel had styled his Notice of Dismissal under Rule 41(a)(1) as a motion to drop Transcontinental as a party under Rule 21 or as a motion to dismiss Transcontinental under Rule 41(a)(2), or if the Rule 15 motion for leave to amend complaint filed the same day as the second notice of dismissal were deemed the operative event effectuating the second dismissal of Transcontinental, there could be no argument that the "two dismissal exception" was triggered. A more glaring and unjust instance of depriving a party of its rights on the basis of a technical misstep of counsel can scarcely be imagined.

[9] *E.g., Sutton Place Development Co. v. Abacus Mortgage Inv. Co.*, 826 F.2d 637, 640 (7th Cir. 1987), *cert. denied*, 485 U.S. 961 (1988); *Randall v. Merrill Lynch*, 820 F.2d 1317, 1320 (D.C. Cir. 1987), *cert. denied*, 484 U.S. 1027 (1988); *Poloron Products Inc. v. Lybrand Ross Bros. & Montgomery, supra; Island Stevedoring, Inc. v. Barge CCBI*, 129 F.R.D. 430, 431-32 (D.P.R. 1990); *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Randall*, 110 F.R.D. 499, 500 (E.D. Cal. 1986).

II. The Circuits Are Split Whether State Or Federal Law Governs Application Of Res Judicata In Successive Diversity Actions.

In this diversity action, the Ninth Circuit Panel **disregarded Nevada law** that the res judicata effect of a prior judgment extends only to the parties and their privies[10] and **created as a matter of federal law** a new "substantial relationship" to the judgment-holder rule.[11] In applying this rule to bar Investors' claims against the Transneva Defendants even though they had not been parties to the previous actions, the Panel specifically acknowledged that they *were not privies of Transcontinental.* (A-10)

In response to a Petition For Rehearing, the Panel issued an Amended Opinion attempting to correct its disregard of the *Erie* doctrine without changing the result. The Amended Opinion thus deleted the original language rejecting a privity requirement and substituted the conclusion that the privity issue is "inapplicable" because the Transneva Defendants are "substantially the same" as Transcontinental. (A-14, A-23 - A-24) However,

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[10] *Paradise Palms Community Ass'n v. Paradise Homes*, 89 Nev. 27, 505 P.2d 596, *cert. denied*, 414 U.S. 865 (1973); *Marine Midland Bank v. Monroe*, 104 Nev. 307, 756 P.2d 1193 (1988). See footnote 18 at page 17, *infra*, for Nevada's definition of a "privy" for res judicata purposes.

[11] The rule created by the Panel is contrary to the principle applied even in federal question cases, in which this Court has repeatedly stated that the bar of res judicata applies only to the parties to the prior proceeding and their privies. *E.g., Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation*, 402 U.S. 313, 320-22 (1971); *Parklane Hosiery Company, Inc. v. Shore*, 439 U.S. 322, 326 (1979). See pages 18-19, *infra*.

that cosmetic change merely substituted one contravention of the *Erie* doctrine for another, since the Panel's determination that a privity requirement is "inapplicable" is itself contrary to Nevada law. Nevada has never excepted subsidiaries of a corporate judgment-holder from the strict requirement that only a privy may avail itself of the res judicata bar of a judgment for another.[12] Absent *facts* proving that one is the alter ego of the other, a parent and a subsidiary corporation are *not* deemed "substantially the same" under Nevada law. *E.g., MGM Grand, Inc. v. Eighth Judicial District Court*, 107 Nev. 65, 807 P.2d 201 (1991); *Bonanza Hotel Gift Shop, Inc. v. Bonanza No. 2*, 95 Nev. 463, 596 P.2d 227 (1979). No such facts were offered here. Thus, application of Nevada's law of res judicata in accordance with the *Erie* doctrine would necessitate reversal of the judgment for the Transneva Defendants.

While this Court has never squarely decided whether, in a diversity case, state or federal law governs the res judicata effect of a judgment in a prior diversity action, its references to the issue strongly suggest that state law must control. Thus, in *Heiser v. Woodruff*, 327 U.S. 726, 731-32 (1946), this Court characterized the issue as whether "the rule of res judicata applied in the federal courts, in diversity of citizenship cases, under the doctrine of *Erie R. Co. v. Tompkins* . . . **can be other than** that of the state in which the federal court sits." (Emphasis added.) And in *Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation*, 402 U.S. 313, 325 (1971), this

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[12] *A fortiori*, a partnership in which such a subsidiary is the general partner has not been excepted.

Court, discussing cases rejecting a mutuality of estoppel requirement for application of collateral estoppel (issue preclusion), wrote:

> Many federal courts, exercising both federal question and diversity jurisdiction, are in accord [that a plaintiff *who has had one trial on the merits* and lost should not be allowed to go to trial on the merits of that claim a second time[13]] *unless in a diversity case* ***bound*** *to apply a conflicting state rule requiring mutuality.* (Emphasis added.)

Notwithstanding the rule enunciated in *Erie* and its progeny that federal courts in diversity cases must apply the substantive law of the state in which the court sits, a widespread split has developed among the Courts of Appeals as to whether, in a diversity case, state or federal law determines the effect of a judgment in a prior diversity case. *Four Circuits* follow the rule that state law governs.[14] *Five Circuits* express the view that federal law

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[13] It must be emphasized that Investors has had no trial on the merits of its claims in this or in any prior action.

[14] The Seventh, Eighth, Ninth (prior to this case) and District of Columbia Circuits hold that state preclusion law applies. *Lane v. Sullivan*, 900 F.2d 1247, 1249-50 (8th Cir.), *cert. denied*, ___ U.S. ___, 111 S.Ct. 134 (1990); *Washington Public Power Supply System v. Pittsburgh-Des Moines Corp.*, 876 F.2d 690, 699 (9th Cir. 1989); *Answering Service, Inc. v. Egan*, 728 F.2d 1500, 1505-06 (D.C. Cir. 1984); *Gasbarra v. Park-Ohio Indus., Inc.*, 655 F.2d 119, 122 (7th Cir. 1981); *but see U.S. Industries, Inc. v. Blake Construction Co.*, 765 F.2d 195, 204 n.20 (D.C. Cir. 1985) (Court stated, without citing *Answering Service, Inc. v. Egan, supra*, that question "appears not to have been entirely settled").

controls.[15] *Three Circuits* are unsettled.[16] Commentators also disagree. *Compare* Degnan, *Federalized Res Judicata*, 85 Yale L.J. 741 (1976), *with* Burbank, *Interjurisdictional Preclusion, Full Faith and Credit and Federal Common Law*, 71 Cornell L.Rev. 733 (1986).

Forum shopping is the inevitable result of different rules in different Circuits as to the res judicata effect of a prior judgment. A definitive ruling from this Court is necessary to resolve this important issue.

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[15] The First, Fourth, Fifth, Sixth and Eleventh Circuits have held that federal preclusion law applies in successive diversity actions. *Johnson v. SCA Disposal Services*, 931 F.2d 970, 974 (1st Cir. 1991); *Empire Fire & Marine Ins. Co. v. J. Transport, Inc.*, 880 F.2d 1291, 1293 n.2 (11th Cir. 1989); *Shoup v. Bell & Howell Co.*, 872 F.2d 1178, 1179 (4th Cir. 1989); *Kurzweg v. Marple*, 841 F.2d 635, 639-40 and n.12 (5th Cir. 1988); *Silcox v. United Trucking Service, Inc.*, 687 F.2d 848, 852 (6th Cir. 1982).

[16] The Third Circuit had held that state preclusion law governs, but has recently questioned that rule. *Lubrizol Corp. v. Exxon Corp.*, 929 F.2d 960, 962-63 and n. 2 (3d Cir. 1991). The Second and Tenth Circuits also are unsettled. *American Motorists Ins. Co. v. General Host Corp.*, 946 F.2d 1482, 1485, *vacated in part on other grounds*, 946 F.2d 1489 (10th Cir. 1991); *Gelb v. Royal Globe Ins. Co.*, 798 F.2d 38, 42 n.3 (2d Cir. 1986).

III. The Extension Of The Res Judicata Bar Of Transcontinental's Judgment To The Transneva Defendants When Investors Had Been Denied The Right To Present *Any* Evidence On The Merits Against Transcontinental Conflicts With Decisions Of This Court, Federal Policy And Investors' Due Process Rights.

In *Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation*, 402 U.S. 313 (1971), and *Parklane Hosiery Co., Inc. v. Shore*, 439 U.S. 322 (1979), this Court modified the rules for applying *collateral estoppel* (issue preclusion) to bar relitigation of issues in federal court. Mutuality of estoppel was eliminated as an absolute condition, and federal court discretion was substituted to determine, on the basis of *justice, equity and fairness*, when collateral estoppel may be applied in the absence of mutuality of estoppel. However, this Court has never sanctioned a similar modification to the doctrine of res judicata, and, indeed, has stated the opposite.[17] The Panel's Amended Opinion not only extends the elimination of mutuality of estoppel to res judicata cases, but does so where there has been **no trial on the merits in any prior action**. Thus, even if Nevada's law of res judicata were not controlling in this diversity case, the Ninth Circuit's ruling raises

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[17] Collateral estoppel applies only where there has been a decision actually adjudicating an issue raised in subsequent litigation. Res judicata is a bar not only to issues actually litigated and decided, but any other issues arising out of the same transaction regardless of whether litigated. *Nevada v. United States, supra*, 463 U.S. at 129-30 and n.11; *Parklane Hosiery Company, Inc. v. Shore, supra*, 439 U.S. at 326 n.5.

significant questions of federal policy and due process of law.

Although the Panel acknowledged that the Transneva Defendants were *not privies* of Transcontinental (A-10),[18] it nonetheless decided that because it perceived that those defendants had a "substantial relationship" to or were "substantially the same" as Transcontinental, Investors' claims against them were barred by the res judicata effect of the judgment for Transcontinental. Significantly, that judgment was based **solely** on the Court's mechanical application of Rule 41(a)(1) to conclude that the filing of a second notice of dismissal "operates as an adjudication upon the merits." (See pp. 6-7, *supra*) **Investors has never had its day in court to present *any* evidence on the merits against Transcontinental or any other defendant.** There has in fact *never* been any adjudication of any of Investors' substantive claims against Transcontinental or any of the other defendants.

This Court has always recognized that under the doctrine of *res judicata*, a judgment emanating from a prior proceeding binds **only** the parties to the prior proceeding and their privies. Thus, in *Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation, supra*, 402 U.S. at 320, this Court stated "mutuality of estoppel ordain[s] that unless both parties (or their privies) in a second action are bound by a judgment in a previous case, neither party (nor his privy) in the second action

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[18] A privy, for res judicata purposes, is one who succeeds to the rights of the judgment-holder. *Paradise Palms Community Association v. Paradise Homes, supra*, 89 Nev. at 31, 505 P.2d at 599.

may use the prior judgment as determinative of an issue in the second action." In *Parklane Hosiery Company, Inc. v. Shore, supra,* 439 U.S. at 326, this Court stated that "[c]ollateral estoppel, *like the related doctrine of res judicata,* has the dual purpose of protecting litigants from the burden of relitigating an identical issue with the same party *or his privy* and of promoting judicial economy by preventing needless litigation." (Emphasis added) (citation and footnote omitted.) In *Nevada v. United States,* 463 U.S. 110, 143 (1983), it was noted that although the strict requirement of mutuality of estoppel had for the most part been eliminated in collateral estoppel cases, "it has remained a part of the doctrine of res judicata."

The Ninth Circuit ruling below extending the res judicata bar of Transcontinental's judgment to non-privies who would *not* be bound by a judgment against Transcontinental abrogates the mutuality of estoppel requirement in res judicata cases and conflicts with this Court's prior decisions.

The federal policies supporting the elimination of mutuality of estoppel in collateral estoppel cases do not support elimination of mutuality of estoppel in res judicata cases where *the judgment in question does not arise from a trial and decision on the merits.* In *Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation, supra,* this Court considered whether a patentee whose patent has once been determined invalid should be collaterally estopped from bringing an action for patent infringement against a different defendant in the absence of mutuality of estoppel. Holding that *"justice and equity"* were the indispensable ingredients of permitting a different defendant who would not have been bound by the judgment

below to assert collateral estoppel, this Court emphasized that the touchstone of *"justice and equity"* was whether the party to be estopped had **an opportunity for a full and fair trial** to adduce the evidence in support of its claims in the first proceeding. 402 U.S. at 328-34. Only then could policies such as not affording a litigant more than one opportunity for judicial resolution of an issue, not allocating resources to relitigation of issues already determined, and presuming that a second case would not lead to a different result, weigh in favor of allowing a defendant to raise an estoppel based on a prior proceeding to which it was not a party or a privy of a party.

Likewise, in *Parklane Hosiery Company, Inc. v. Shore, supra,* considering offensive use of collateral estoppel by one who was neither a party nor a privy to a party in an earlier proceeding, this Court confirmed that the *fairness* of permitting such an estoppel turned on whether the party to be estopped had a full opportunity to present evidence on the merits in the first proceeding. 439 U.S. at 326-32.

Here, Investors has had *no* trial on the merits of its claims in *any* proceeding against any defendant. Summary judgment was entered against it and for Transcontinental **solely** because its former counsel committed the procedural error of filing two notices of dismissal, each of which was intended to be without prejudice. Thus, policies which led to abandonment of mutuality of estoppel in collateral estoppel cases – not giving a party who has had one trial a second bite at the apple, not allocating resources to a second trial of the same issue and presuming that the second case would not yield a different result – simply have no application here. It is self-evident that

the judgment for Transcontinental under Rule 41(a)(1) reveals *nothing* about the merits of Investors' case against the Transneva Defendants. Expressed another way, the fact that the triggering of the "two dismissal exception" "operates as an adjudication" that *Transcontinental* did not tortiously interfere with Investors' contract does not establish in any way that the Transneva Defendants were not guilty of such conduct.[19]

Moreover, since Investors was *never* permitted to introduce any evidence on the merits of its claims against Transcontinental, barring its claims against the Transneva Defendants on the basis of the judgment for Transcontinental raises substantial due process issues.[20] Although the decisions in *Blonder-Tongue* and *Parklane Hosiery* were not specifically from a constitutional perspective, this Court emphasized in both cases that absence of the opportunity to present evidence on the merits in an earlier case would go to the fundamental fairness of barring a party to that case from litigating the same claim against different parties in another case. This Court further noted that **it would be a denial of due process** for a judgment to be binding on litigants who never appeared in a prior

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[19] Since Investors had *never* before sued the Transneva Defendants, there is no conceivable advancement of the "two dismissal exception's" policy of avoiding abuse and harassment in insulating those defendants from claims of Investors.

[20] Since the Ninth Circuit acknowledged that the Transneva Defendants are not privies of Transcontinental, the constitutionality of extending the res judicata bar of a prior judgment to the judgment-holder's privy is *not* at issue.

proceeding because "[t]hey have never had a chance to present their evidence and arguments on the claim." *Blonder-Tongue, supra,* 402 U.S. at 328-29, 331-33; *Parklane Hosiery, supra,* 439 U.S. at 327 n.7, 331-32.

CONCLUSION

A writ of certiorari should issue to review the important national issues raised by the Opinion and Amended Opinion of the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted,

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FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

LAKE AT LAS VEGAS INVESTORS GROUP, INC., *Plaintiff-Appellant,* v. PACIFIC MALIBU DEVELOPMENT CORP., et al., *Defendants,* TRANSCONTINENTAL CORP., TRANSNEVA CORP., and TRANSNEVA LIMITED PARTNERSHIP, *Defendants-Appellees.*	No. 89-16496 D.C. No. CV-S-87-768-RDF OPINION

Appeal from the United States District Court
for the District of Nevada
Roger D. Foley, District Judge, Presiding

Argued and Submitted
April 4, 1991 – San Francisco, California

Filed May 13, 1991

Before: Thomas Tang, Jerome Farris and
Dorothy W. Nelson, Circuit Judges.

Opinion by Judge Farris

OPINION

FARRIS, Circuit Judge:

OVERVIEW

Lake at Las Vegas Investors Group, Inc. appeals the district court's dismissal of its action for interference with and breach of contract against Transcontinental Corporation, Transneva Corporation, and Transneva Limited Partnership. The dismissal was pursuant to the rule that two voluntary dismissals under Federal Rule of Civil Procedure 41(a) operate as an adjudication on the merits.

JURISDICTION

The district court had jurisdiction pursuant to 28 U.S.C. § 1332(a)(1). This court has jurisdiction over the timely appeal pursuant to 28 U.S.C. § 1291.

ISSUES

(1) Whether the district court erred in granting Transcontinental's motion to dismiss pursuant to the two dismissal exception of Rule 41(a).

(a) Because Nev. Rev. Stat. § 80.210(1) rendered Investors's first complaint a nullity.

(b) Because Investors's first dismissal was not "voluntary."

(c) Because neither dismissal was for the purpose of harassing transcontinental.

(d) Because Investors's second dismissal was not a dismissal of an "action" within the meaning of Rule 41 since only one defendant was dismissed.

(2) Whether the district court erred in dismissing Transneva Corp. and Transneva Limited Partnership because Investors had not previously dismissed any complaint against them.

(3) Whether the district Court's failure to allow oral argument pursuant to a local rule was prejudicial to Investors.

STANDARD OF REVIEW

A district court's dismissal on res judicata grounds is subject to de novo review. *Guild Wineries & Distilleries v. Whitehall Co.*, 853 F.2d 755, 758 (9th Cir. 1988).

FACTS

On October 9, 1987, Investors filed its first complaint against Pacific Malibu Development Corporation, Barry Silverton, and Transcontinental Corporation alleging that Transcontinental had interfered with and induced the breach of an agreement between Investors and Pacific Malibu and Silverton. On October 15, Investors filed a notice of voluntary dismissal of this complaint pursuant to Nevada Rule of Civil Procedure 41(a)(1) and refiled the same complaint immediately thereafter. Pacific Malibu removed to federal court on diversity grounds.

On November 10, 1987, Investors filed a voluntary dismissal of all claims against Transcontinental pursuant

to Federal Rule of Civil Procedure 41(a)(1). It also moved to amend its complaint against Pacific Malibu and Silverton. On April 4, 1988, Investors moved for leave to add as parties Transcontinental, Transneva Corporation (a wholly owned subsidiary of Transcontinental), Transneva Limited Partnership (in which Transneva Corporation is a general partner), and Lake at Las Vegas Joint Venture.

On October 28, 1988, the district court granted Transcontinental's motion to dismiss Transcontinental and the two Transneva entities pursuant to the two dismissal rule of Rule 41(a)(1) and denied Investors's motion for oral argument. Investors's motion for reconsideration was denied.

DISCUSSION

I. *Applicability of Rule 41(a)*

Rule 41(a) provides that:

> Rule 41. Dismissal of Actions
>
> (a) Voluntary Dismissal: Effect Thereof
>
> (1) By Plaintiff; by Stipulation. . . . [A]n action may be dismissed by the plaintiff without order of court (i) by filing a notice of dismissal at any time before service by the adverse party of an answer or of a motion for summary judgment, whichever first occurs, or (ii) by filing a stipulation of dismissal signed by all parties who have appeared in the action. Unless otherwise stated in the notice of dismissal or stipulation, the dismissal is without prejudice, except that a notice of dismissal operates as an adjudication upon the merits when filed by a plaintiff who has once dismissed in any court of the United

> States or of any state an action based on or including the same claim.

Fed. R. Civ. P. 41(a). Investors offers several arguments in support of its contention that its two dismissals do not bring it within the operation of the Rule.

A. *Whether Filing in State Court Commenced an "Action"*

Nevada Revised Statute § 80.210(1) provides that foreign corporations "shall not be allowed to commence, maintain, or defend any action or proceeding in any court of the state" until registered to do business in Nevada. Investors argues that because it was not registered when it filed its first state court complaint, the complaint did not commence an action within the meaning of Rule 41(a), but rather was a "nullity" by operation of section 80.210(1). Therefore, it argues, its motion to dismiss under Rule 41(a) was not a voluntary dismissal of an action since an action never existed.

Nevada law does not provide a clear answer to this ingenious argument. *Compare League to Save Lake Tahoe v. Tahoe Regional Planning Agency*, 93 Nev. 270, 275, 563 P.2d 582, 585 (1977) (complaint filed by unregistered corporation is subject to dismissal even if the corporation later complies with 80.210(1) and does not toll statute of limitations) *and Bader Enterprises, Inc. v. Olsen*, 98 Nev. 381, 383, 649 P.2d 1369, 1370 (1982) (using the term "jurisdiction" when discussing section 80.210(1)) *with Harmon v. Telerent Leasing Corp.*, 93 Nev. 186, 187, 561 P.2d 1340, 1341 (1977) (referring to 80.210(1) as an affirmative defense) *and Marshall Earth Resources, Inc. v. Parks*, 99 Nev. 251, 252,

661 P.2d 875, 876 (1983) (plaintiff who sues an unregistered foreign corporation waives the issue of registration). Lack of capacity to sue is an affirmative defense in other contexts, *see Shaw v. Stutchman*, 105 Nev. Adv. Op. 27, 771 P.2d 156, 159 (1989), and an "action" is deemed commenced by the filing of a complaint under Nevada Rule of Civil Procedure 3. We reject Investors's argument. We hold that although the complaint may have been subject to dismissal, Investors commenced an "action" that could be and was voluntarily dismissed under Rule 41(a).

B. *Voluntariness of First Dismissal*

Investors next argues that, even if it did commence an "action" within the Rule, its first dismissal was not "voluntary." It bases this argument on the fact that its action would have been subject to dismissal under Nevada Revised Statute § 80.210(1). It urges us to hold that voluntary dismissal of a complaint subject to dismissal is no different than having the complaint dismissed by an order of the court.

In *Randall v. Merrill Lynch*, 820 F.2d 1317 (D.C. Cir. 1987), *cert. denied*, 484 U.S. 1027 (1988), the D.C. Circuit explained:

> The term "voluntary" in Rule 41 means that the party is filing the dismissal without being compelled by another party or the court. In other words, it does not mean that other circumstances might not have compelled the dismissal or that the party desired it.

Id. at 1321. We find the D.C. Circuit's reasoning sound. Rule 41 distinguishes between voluntary, or section (a), dismissals and involuntary, or section (b), dismissals on the basis of which party initiates the dismissal. And, while it delineates the bases upon which the defendant may seek an involuntary dismissal, it does not consider the plaintiff's reasons for seeking a voluntary dismissal.

Further, there were alternatives to filing for voluntary dismissal. If Investors had allowed the defendants to move for a dismissal, it would have been without prejudice under Nevada law if Investors had complied with section 80.210 before the dismissal and the statute of limitations had not run. *See Atlantic Commercial Dev. Corp. v. Boyles*, 103 Nev. 35, 37, 732 P.2d 1360, 1362 (1987). In addition, Investors could have registered and then filed a motion with the court to have its case voluntarily dismissed pursuant to Rule 41(a)(2). *See Sutton Place Dev. Co. v. Abacus Mortgage Inv. Co.*, 826 F.2d 637, 640 (7th Cir. 1987), *cert. denied*, 485 U.S. 961 (1988).

The Nevada Supreme Court's interpretation of voluntariness in *Hiles Co. v. Johnston Pump Co.*, 93 Nev. 73, 77, 560 P.2d 154, 156 (1977), does not control. *Hiles* involved a statutory savings clause that allowed certain U.C.C. actions to be recommenced within six months unless the prior dismissal was due to "voluntary discontinuance" or failure to prosecute. The Nevada court found that the plaintiff's stipulated dismissal without prejudice was not a "voluntary discontinuance" because the plaintiff was motivated by its failure to name the proper party defendant. We decline to apply that analysis in the different context of Rule 41.

C. *Whether Rule 41(a)'s Two Dismissal Exception Requires Actual Intent to Harass*

Investors also argues that the two dismissal exception should not be applied if the dismissals were not for the purpose of harassing or abusing the defendants. The Rule does not require an inquiry into the circumstances of the two dismissals. However, a few cases have suggested that, in certain limited circumstances, the Rule will not be literally applied. In *Poloron Prod., Inc. v. Lybrand Ross Bros. & Montgomery*, 534 F.2d 1012, 1017-18 (2d Cir. 1976), the Second Circuit held that the two dismissal bar of Rule 41(a) does not apply where one of the prior voluntary dismissals was by stipulation knowingly consented to by all parties. The court acknowledged that Rule 41(a) does not distinguish between unilateral and stipulated voluntary dismissals, but held that a stipulated voluntary dismissal posed little danger of harassment and therefore should not bar an otherwise proper suit. *Id.* at 1017. The court observed that the defendant could have declined to agree to the dismissal or could have insisted that it be with prejudice. *Id.* This holding, when followed, has been limited to its facts and does not preclude application of the bar where the voluntary dismissal is unilateral. *See Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Randall*, 110 F.R.D. 499, 500 (E.D. Cal. 1986); *but see Island Stevedoring, Inc. v. Barge CCBI*, 129 F.R.D. 430, 432 (D.P.R. 1990).

Sutton Place Dev. Co. v. Abacus Mortgage Inv. Co., 826 F.2d 637, 640-41 (7th Cir. 1987), *cert. denied*, 485 U.S. 961 (1988), also cited by Investors, held that a dismissal *by motion* (i.e., a dismissal falling outside of the language of

Rule 41(a)(1)) would not be considered for purposes of the two dismissal bar, because to do so would expand the exception to the rule that voluntary dismissals are without prejudice. *Sutton Place* limits an expansion of Rule 41(a)(1), but it hardly suggests that dismissals which fall *squarely within the language of the Rule* should be read out of it via an intent inquiry.

D. *Whether a Dismissal Must be of All Defendants*

Investors contends that under *Harvey Aluminum, Inc. v. American Cyanamid Co.*, 203 F.2d 105 (2d Cir. 1953), *cert. denied*, 345 U.S. 964, its second dismissal was not a dismissal for Rule 41(a)(1) purposes because it dismissed only Transcontinental, and dismissal of an "action" occurs only when all defendants are dismissed.

Rule 41(a) may be invoked to dismiss less than all of the parties. *See, e.g., Wakefield v. Northern Telecom, Inc.*, 769 F.2d 109, 114 n.4 (2d Cir. 1985) (noting that *Harvey Aluminum*, 203 F.2d 105, is against the weight of authority); *Oswalt v. Scripto, Inc.*, 616 F.2d 191, 194-95 (5th Cir. 1980); 5 J.W. Moore, J.D. Lucas, & T.S. Currier, *Moore's Federal Practice* § 41.06-1, at 41-84 to 41-89 (2d ed. 1988). We need not decide whether a Rule 41(a)(1) dismissal of less than all parties should be sufficient in every instance to trigger the two dismissal bar. We hold only that upon these facts, the Rule applies.

II. *Applicability of Dismissal to Transneva Entities*

Investors argues that even if the dismissal of Transcontinental was proper under the two dismissal bar,

Transneva Corporation and Transneva Limited Partnership were never dismissed and therefore can not claim the benefit of the bar. The question is what relationship, if any, is required between the party twice dismissed and a party seeking to enforce the bar against the plaintiff.

Investors argues that privity is required. We recognize that *Manning v. South Carolina Dept. of Highway & Public Transp.*, 914 F.2d 44, 48 (4th Cir. 1990), invoked privity in its analysis, but we reject the argument for a strict privity requirement. Nevertheless, we agree with Investors that the weight of authority requires at least a relationship between the dismissed party and the party seeking to claim the benefit of the bar. *See, e.g.*, 9 C. Wright & A. Miller, *Federal Practice & Procedure* § 2368, at 190 (1971 & Supp. 1990) (unrelated parties should not be allowed to claim the benefit of Rule). The case relied upon by the Transneva defendants, *City of Raleigh v. College Campus Apartments*, 94 N.C. App. 280, 284-85, 380 S.E.2d 163, 166 (1989) (interpreting state rule identical to Rule 41(a)(1)), *aff'd*, 326 N.C. 360, 388 S.E.2d 768 (1990), is not to the contrary. While the court stated that no "same defendant" requirement should be read into the Rule, it also recognized that, as a factual matter, the defendant seeking to enforce the bar was "substantially the same" as the defendant dismissed; he was the sole shareholder and registered agent of the dismissed corporate defendant and had been named in the second dismissed action.

Privity, in its traditional sense, is absent, but the relationship between Transcontinental and the two Transneva defendants is substantial. As in *City of Raleigh*, the plaintiff named the wrong, but closely related, entity. We need not define the precise parameters of the applicable

test. We hold only that the wholly-owned subsidiary and partnership in which that subsidiary is the general partner may invoke the rights of the subsidiary's parent for purposes of Rule 41(a)(1) res judicata. Investors's error is typical of the type of error motivating voluntary dismissals under Rule 41(a)(1). As a practical matter, the danger of harassment to the parent continued when the closely related Transneva entities were sued.

III. *Oral Argument*

Investors argues that the district court's failure to grant its request for oral argument requires reversal.

District of Nevada Local Rule 140-9 requires the court to grant requests for oral argument on motions for summary judgment made by a party opposing summary judgment unless the summary judgment motion is denied. *Houston v. Bryan*, 725 F.2d 516, 518 (9th Cir. 1984), held that a violation of this rule is reversible error only if the violation is prejudicial. Investors argues that because the district court evidenced some uncertainty about whether Investors's motives for dismissing were relevant, denial of oral argument was prejudicial. *See Jasinski v. Showboat Operating Co.*, 644 F.2d 1277, 1280-81 (9th Cir. 1981). Since intent is not relevant to the Rule's application, the district court's alleged uncertainty was not pivotal.

The district court did not address Investors's privity concerns, but it permitted briefing on the question in Investors's motion to reconsider. Investors had the opportunity to apprise the district court of any arguments it

believed supported its position that the Transneva entities should not be dismissed. When a party has an adequate opportunity to provide the trial court with evidence and memorandum of law, there is no prejudice since any error can be rectified by an appeal of the summary judgment. *Bratt v. International Business Mach. Corp.*, 785 F.2d 352, 363 (1st Cir. 1986).

AFFIRMED.

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
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Appeal from the United States District Court
for the District of Nevada
Roger D. Foley, District Judge, Presiding

Argued and Submitted
April 4, 1991 – San Francisco, California

Filed May 13, 1991
Amended August 23, 1991

Before: Thomas Tang, Jerome Farris and
Dorothy W. Nelson, Circuit Judges.

Opinion by Judge Farris

ORDER

The opinion filed May 13, 1991, is amended as follows:

(1) At slip op. page 6066 [A-10], first full paragraph, first sentence: substitute "Rule 41(a)(1) requires privity" for "privity is required"

(2) At slip op. page 6066 [A-10], first full paragraph, second and third sentences: substitute "but find the argument for a strict privity requirement inapplicable here. We agree" for "but we reject the argument for a strict privity requirement. Nevertheless, we agree"

(3) At slip op. page 6066 [A-10], last paragraph, first sentence: delete and substitute "The relationship between Transcontinental and the two Transneva defendants is sufficient to render them "substantially the same" for purposes of Rule 41(a)(1)."

(4) At slip op. page 6066 [A-10 – A-11], last paragraph, fourth sentence: substitute "two dismissals of the subsidiary's parent and claim Rule 41(a)(1) res judicata" for "rights of the subsidiary's parent for purposes of Rule 41(a)(1) res judicata"

With the foregoing amendments, the panel has voted to deny appellant's petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the amendments to the opinion and of the suggestion for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. Fed.R.App.P. 35.

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

OPINION

FARRIS, Circuit Judge:

OVERVIEW

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A. *Whether Filing in State Court Commenced an "Action"*

Nevada Revised Statute § 80.210(1) provides that foreign corporations "shall not be allowed to commence, maintain, or defend any action or proceeding in any court of the state" until registered to do business in Nevada. Investors argues that because it was not registered when it filed its first state court complaint, the complaint did not commence an action within the meaning of Rule 41(a), but rather was a "nullity" by operation of section 80.210(1). Therefore, it argues, its motion to dismiss under Rule 41(a) was not a voluntary dismissal of an action since an action never existed.

Nevada law does not provide a clear answer to this ingenious argument. *Compare League to Save Lake Tahoe v. Tahoe Regional Planning Agency*, 93 Nev. 270, 275, 563 P.2d 582, 585 (1977) (complaint filed by unregistered corporation is subject to dismissal even if the corporation later complies with 80.210(1) and does not toll statute of limitations) *and Bader Enterprises, Inc. v. Olsen*, 98 Nev. 381, 383, 649 P.2d 1369, 1370 (1982) (using the term "jurisdiction" when discussing section 80.210(1)) *with Harmon v.*

Telerent Leasing Corp., 93 Nev. 186, 187, 561 P.2d 1340, 1341 (1977) (referring to 80.210(1) as an affirmative defense) *and Marshall Earth Resources, Inc. v. Parks*, 99 Nev. 251, 252, 661 P.2d 875, 876 (1983) (plaintiff who sues an unregistered foreign corporation waives the issue of registration). Lack of capacity to sue is an affirmative defense in other contexts, *see Shaw v. Stutchman*, 105 Nev. Adv. Op. 27, 771 P.2d 156, 159 (1989), and an "action" is deemed commenced by the filing of a complaint under Nevada Rule of Civil Procedure 3. We reject Investors's argument. We hold that although the complaint may have been subject to dismissal, Investors commenced an "action" that could be and was voluntarily dismissed under Rule 41(a).

B. *Voluntariness of First Dismissal*

Investors next argues that, even if it did commence an "action" within the Rule, its first dismissal was not "voluntary." It bases this argument on the fact that its action would have been subject to dismissal under Nevada Revised Statute § 80.210(1). It urges us to hold that voluntary dismissal of a complaint subject to dismissal is no different than having the complaint dismissed by an order of the court.

In *Randall v. Merrill Lynch*, 820 F.2d 1317 (D.C. Cir. 1987), *cert. denied*, 484 U.S. 1027 (1988), the D.C. Circuit explained:

> The term "voluntary" in Rule 41 means that the party is filing the dismissal without being compelled by another party or the court. In

> other words, it does not mean that other circumstances might not have compelled the dismissal or that the party desired it.

Id. at 1321. We find the D.C. Circuit's reasoning sound. Rule 41 distinguishes between voluntary, or section (a), dismissals and involuntary, or section (b), dismissals on the basis of which party initiates the dismissal. And, while it delineates the bases upon which the defendant may seek an involuntary dismissal, it does not consider the plaintiffs reasons for seeking a voluntary dismissal.

Further, there were alternatives to filing for voluntary dismissal. If Investors had allowed the defendants to move for a dismissal, it would have been without prejudice under Nevada law if Investors had complied with section 80.210 before the dismissal and the statute of limitations had not run. *See Atlantic Commercial Dev. Corp. v. Boyles*, 103 Nev. 35, 37, 732 P.2d 1360, 1362 (1987). In addition, Investors could have registered and then filed a motion with the court to have its case voluntarily dismissed pursuant to Rule 41(a)(2). *See Sutton Place Dev. Co. v. Abacus Mortgage Inv. Co.*, 826 F.2d 637, 640 (7th Cir. 1987), *cert. denied*, 485 U.S. 961 (1988).

The Nevada Supreme Court's interpretation of voluntariness in *Hiles Co. v. Johnston Pump Co.*, 93 Nev. 73, 77, 560 P.2d 154, 156 (1977), does not control. *Hiles* involved a statutory savings clause that allowed certain U.C.C. actions to be recommenced within six months unless the prior dismissal was due to "voluntary discontinuance" or failure to prosecute. The Nevada court found that the plaintiff's stipulated dismissal without prejudice was not a "voluntary discontinuance" because the plaintiff was motivated by its failure to name the proper party

defendant. We decline to apply that analysis in the different context of Rule 41.

C. *Whether Rule 41(a)'s Two Dismissal Exception Requires Actual Intent to Harass*

Investors also argues that the two dismissal exception should not be applied if the dismissals were not for the purpose of harassing or abusing the defendants. The Rule does not require an inquiry into the circumstances of the two dismissals. However, a few cases have suggested that, in certain limited circumstances, the Rule will not be literally applied. In *Poloron Prod., Inc. v. Lybrand Ross Bros. & Montgomery*, 534 F.2d 1012, 1017-18 (2d Cir. 1976), the Second Circuit held that the two dismissal bar of Rule 41(a) does not apply where one of the prior voluntary dismissals was by stipulation knowingly consented to by all parties. The court acknowledged that Rule 41(a) does not distinguish between unilatera! and stipulated voluntary dismissals, but held that a stipulated voluntary dismissal posed little danger of harassment and therefore should not bar an otherwise proper suit. *Id.* at 1017. The court observed that the defendant could have declined to agree to the dismissal or could have insisted that it be with prejudice. *Id.* This holding, when followed, has been limited to its facts and does not preclude application of the bar where the voluntary dismissal is unilateral. *See Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Randall*, 110 F.R.D. 499, 500 (E.D. Cal. 1986); *but see Island Stevedoring, Inc. v. Barge CCBI*, 129 F.R.D. 430, 432 (D.P.R. 1990).

Sutton Place Dev. Co. v. Abacus Mortgage Inv. Co., 826 F.2d 637, 640-41 (7th Cir. 1987), *cert. denied*, 485 U.S. 961

(1988), also cited by Investors, held that a dismissal *by motion* (i.e., a dismissal falling outside of the language of Rule 41(a)(1)) would not be considered for purposes of the two dismissal bar, because to do so would expand the exception to the rule that voluntary dismissals are without prejudice. *Sutton Place* limits an expansion of Rule 41(a)(1), but it hardly suggests that dismissals which fall *squarely within the language of the Rule* should be read out of it via an intent inquiry.

D. *Whether a Dismissal Must be of All Defendants*

Investors contends that under *Harvey Aluminum, Inc. v. American Cyanamid Co.*, 203 F.2d 105 (2d Cir. 1953), *cert. denied*, 345 U.S. 964, its second dismissal was not a dismissal for Rule 41(a)(1) purposes because it dismissed only Transcontinental, and dismissal of an "action" occurs only when all defendants are dismissed.

Rule 41(a) may be invoked to dismiss less than all of the parties. *See, e.g., Wakefield v. Northern Telecom, Inc.*, 769 F.2d 109, 114 n.4 (2d Cir. 1985) (noting that *Harvey Aluminum*, 203 F.2d 105, is against the weight of authority); *Oswalt v. Scripto, Inc.*, 616 F.2d 191, 194-95 (5th Cir. 1980); 5 J.W. Moore, J.D. Lucas, & T.S. Currier, *Moore's Federal Practice* § 41.06-1, at 41-84 to 41-89 (2d ed. 1988). We need not decide whether a Rule 41(a)(1) dismissal of less than all parties should be sufficient in every instance to trigger the two dismissal bar. We hold only that upon these facts, the Rule applies.

II. *Applicability of Dismissal to Transneva Entities*

Investors argues that even if the dismissal of Transcontinental was proper under the two dismissal bar, Transneva Corporation and Transneva Limited Partnership were never dismissed and therefore can not claim the benefit of the bar. The question is what relationship, if any, is required between the party twice dismissed and a party seeking to enforce the bar against the plaintiff.

Investors argues that Rule 41(a)(1) requires privity. We recognize that *Manning v. South Carolina Dept. of Highway & Public Transp.*, 914 F.2d 44, 48 (4th Cir. 1990), invoked privity in its analysis, but find the argument for a strict privity requirement inapplicable here. We agree with Investors that the weight of authority requires at least a relationship between the dismissed party and the party seeking to claim the benefit of the bar. *See, e.g.*, 9 C. Wright & A. Miller, *Federal Practice & Procedure* § 2368, at 190 (1971 & Supp. 1990) (unrelated parties should not be allowed to claim the benefit of Rule). The case relied upon by the Transneva defendants, *City of Raleigh v. College Campus Apartments*, 94 N.C. App. 280, 284-85, 380 S.E.2d 163, 166 (1989) (interpreting state rule identical to Rule 41(a)(1)), *aff'd*, 326 N.C. 360, 388 S.E.2d 768 (1990), is not to the contrary. While the court stated that no "same defendant" requirement should be read into the Rule, it also recognized that, as a factual matter, the defendant seeking to enforce the bar was "substantially the same" as the defendant dismissed; he was the sole shareholder and registered agent of the dismissed corporate defendant and had been named in the second dismissed action.

The relationship between Transcontinental and the two Transneva defendants is sufficient to render them "substantially the same" for purposes of Rule 41(a)(1). As in *City of Raleigh*, the plaintiff named the wrong, but closely related, entity. We need not define the precise parameters of the applicable test. We hold only that the wholly-owned subsidiary and partnership in which that subsidiary is the general partner may invoke the two dismissals of the subsidiary's parent and claim Rule 41(a)(1) res judicata. Investors's error is typical of the type of error motivating voluntary dismissals under Rule 41(a)(1). As a practical matter, the danger of harassment to the parent continued when the closely related Transneva entities were sued.

III. *Oral Argument*

Investors argues that the district court's failure to grant its request for oral argument requires reversal.

District of Nevada Local Rule 140-9 requires the court to grant requests for oral argument on motions for summary judgment made by a party opposing summary judgment unless the summary judgment motion is denied. *Houston v. Bryan*, 725 F.2d 516, 518 (9th Cir. 1984), held that a violation of this rule is reversible error only if the violation is prejudicial. Investors argues that because the district court evidenced some uncertainty about whether Investors's motives for dismissing were relevant, denial of oral argument was prejudicial. *See Jasinski v. Showboat Operating Co.*, 644 F.2d 1277, 1280-81 (9th Cir.

1981). Since intent is not relevant to the Rule's application, the district court's alleged uncertainty was not pivotal.

The district court did not address Investors's privity concerns, but it permitted briefing on the question in Investors's motion to reconsider. Investors had the opportunity to apprise the district court of any arguments it believed supported its position that the Transneva entities should not be dismissed. When a party has an adequate opportunity to provide the trial court with evidence and memorandum of law, there is no prejudice since any error can be rectified by an appeal of the summary judgment. *Bratt v. International Business Mach. Corp.*, 785 F.2d 352, 363 (1st Cir. 1986).

AFFIRMED.

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

LAKE AT LAS VEGAS INVESTORS GROUP, INC. Plaintiff, vs. PACIFIC MALIBU DEVELOPMENT CORPORATION, a California corporation, PACIFIC MALIBU DEVELOPMENT CORPORATION, a Nevada corporation, BARRY SILVERTON, TRANSCONTINENTAL CORPORATION, TRANSNEVA CORPORATION, TRANSNEVA LIMITED PARTNERSHIP, and LAKE AT LAS VEGAS JOINT VENTURE, Defendants.	CASE NO. CV-S-87-768 RDF ORDER GRANTING MOTION TO DISMISS (Entered Oct. 28, 1988)

INTRODUCTION

This order concerns defendants' TRANSCONTINENTAL CORPORATION, TRANSNEVA CORPORATION, and TRANSNEVA LIMITED PARTNERSHIP ("Trans defendants") motion to dismiss filed June 13, 1988 (Docket No. 69). Trans defendants bring their motion based upon Fed. R. Civ. P. 41(a)(1), alleging that Plaintiff, LAKE AT LAS VEGAS INVESTORS GROUP, INC. ("Investors") has twice dismissed the same claim against Trans defendants and that the second dismissal operates as an adjudication on the merits thus barring, by *res judicata*, Investors' third amended complaint.

FACTS

Investors claims that it entered into a series of agreements with defendant PACIFIC MALIBU DEVELOPMENT CORP. ("Pacific"). Under these agreements, Pacific was to assemble land for development and obtain the necessary permits and government approvals by September 18, 1987. Investors was to obtain a bona fide loan commitment to finance the acquisition of the land assembled by Pacific by September 22, 1987 and Investors was to close escrow by October 31, 1987.

Pacific's obligations were contingent upon Investors tendering a bona fide financing commitment by September 22, 1987. Also, Pacific agreed that its duty toward Investors was one of a fiduciary and that it would not undertake action which conflicted with its duty toward Investors.

Investors' obligation to close escrow by October 31, 1987 was subject to Pacific's performance of its obligations. If Pacific did not timely perform, Investors received two (2) thirty (30) day extensions. There appears to be no express provision for extension of time for tendering the bona fide financing commitment. In the event a contingency fails, the agreement is void.

On September 22, 1987 Investors obtained a letter from a bank indicating that the bank would be willing to loan the money provided certain conditions were met. Investors claims that this is a bona fide financing commitment. Pacific claims that it is only a letter indicating a willingness to provide financing if certain additional conditions are satisfied.

Investors also claims that on September 21, 1987 Pacific orally modified the agreement to allow Investors until October 25, 1987 to finalize the financing arrangements. A written modification allowing this extension was delivered to Pacific but was never executed. In addition, Investors claims that Pacific has not performed its obligations under the agreement and that it is therefore entitled to a thirty (30) day extension of the time in which it is obligated to tender a bona fide financing commitment. However, the extension language appears to apply only to Investors' obligation to close on the land by October 31, 1987.

Because the agreement stated that failure of any contingency rendered the agreement void, and because Pacific's obligations were conditioned upon Investors' tender of a bona fide financing commitment, Pacific believed that Investors' failure to perform voided the agreement and it began looking for other sources of funding. Pacific negotiated and eventually formalized an agreement with TRANSCONTINENTAL CORP.

Investors allege that TRANSCONTINENTAL CORP. wilfully and maliciously caused Pacific, and defendant BARRY SILVERTON (CEO of Pacific) to breach their agreement with Investors and enter into the subsequent agreement with TRANSCONTINENTAL CORP. In order to finalize the latter agreement, Transcontinental Corp. formed a limited partnership, TRANSNEVA LIMITED PARTNERSHIP, of which the general partner is TRANSNEVA CORPORATION. The Transneva Corporation is a wholly owned subsidiary of Transcontinental Corporation. Transneva Limited Partnership entered into a formal contract with Pacific, forming defendant LAKE AT LAS

VEGAS JOINT VENTURE ("Joint Venture") which eventually purchased the land in question.

PROCEDURAL HISTORY

Investors is seeking relief based upon its third amended complaint. Investors filed its first complaint against Pacific, Silverton, and Transcontinental Corp. in Nevada State Court on October 9, 1987. Investors charged Transcontinental with civil conspiracy to breach and tortious interference with the alleged contract between Investors and Pacific. On October 15, 1987, Investors, pursuant to Nev. R. Civ. P. 41(a)(1) voluntarily dismissed by notice the original complaint as to all defendants.

On October 16, 1987 Investors filed a second complaint in state court that was identical to the first complaint as to parties and claims. This complaint was removed to federal court on October 22, 1987. On November 10, 1987, Investors filed a notice of voluntary dismissal by notice of all claims against Transcontinental Corp. pursuant to Fed. R. Civ. P. 41(a)(1) and then moved to amend its complaint against Pacific and Silverton. Investors dismissed Transcontinental Corp. so that the agreement between Transcontinental and Pacific could be finalized.

On April 4, 1988 Investors moved to amend its complaint a third time to reassert claims against Transcontinental and the other Trans defendants for their alleged interference with Investors' contractual rights. The Trans defendants now move to dismiss the third amended complaint stating that the second voluntary dismissal constituted a dismissal with prejudice with respect to the Trans defendants.

LEGAL ANALYSIS

Fed. R. Civ. P. 41 discusses Dismissal of Actions. It states in pertinent part:

> . . . an action may be dismissed by the plaintiff without order of the court (i) by filing a notice of dismissal at any time before service by the adverse party of an answer or of a motion for summary judgment, whichever first occurs, . . . Unless otherwise stated in the notice of dismissal . . . , the dismissal is without prejudice, except that a notice of dismissal operates as an adjudication upon the merits when filed by a plaintiff who has once dismissed in any court of the United States or of any state an action based on or including the same claim.

Investors has made two prior dismissals with respect to Transcontinental. The first was made pursuant to Nev. R. Civ. P. 41(a)(1), which is identical to the Federal Rule. The second dismissal was made pursuant to Fed. R. Civ. P. 41(a)(1). Technically, this second dismissal acts as *res judicata* with respect to Transcontinental.

Several issues arise which must be discussed. First, do defendants Transneva Limited Partnership and Transneva Corporation derive the same rights as Transcontinental under Rule 41(a) (1)? The Trans defendants allege contractual privity amongst themselves. Investors fails to contest this argument. Defendants' argument appears to be sound since Transneva corporation is wholly owned by Transcontinental and Transneva Corp. is the general partner of Transneva Limited Partnership. Therefore, the *res judicata* argument should apply to all three Trans defendants.

Secondly, Investors raises the argument that its prior dismissals against Transcontinental were not "voluntary" as required by the Rule. Investors states that the first state action was dismissed because Investors was not registered to do business in Nevada as foreign corporation and case law mandates that such a complaint be dismissed without prejudice. Investors immediately registered to do business in Nevada and refiled the action.

The Court in *Randall v. Merrill Lynch*, 820 F.2d 1317, 1321 (D.C. Cir. 1987) held that "The term 'voluntary' in Rule 41 means that the party is filing the dismissal without being compelled by another party or the court." Although there is no evidence that the state court compelled the dismissal, Nevada statutory and case law forbids a corporation to bring an action in its courts if that corporation has not complied with the requirements for doing business in Nevada. N.R.S. 80.210(1); *Atlantic Commercial Development Corp. v. Boyles*, 103 Nev. 9, 732 P.2d 1360 (1987); *Pettit v. Management Guidance, Inc.*, 95 Nev. 834, 603 P.2d 697 (1979).

Although the court did not order the dismissal, it certainly had the power to do so. Just because the court had the power to dismiss probably is not sufficient to label Investors' initial dismissal of the complaint "involuntary" especially in light of *Randall's* holding that to be involuntary a court must compel the dismissal.

A third issue is whether the dropping of Transcontinental as a party constituted a "dismissal of an *action*." Investors argues that Rule 41(a)(1) applies only to dismissal of whole actions and not to the dismissal of individual parties. Investors is mistaken in this argument. Several

cases have held that Rule 41(a)(1) applies to the dismissal of less than all defendants. *Plains Growers, Inc. v. Ickes-Braun Glasshouses, Inc.*, 474 F.2d 250 (5th Cir. 1974); *Hinkle's Jeep Sales v. Villa Enterprises, Inc.*, 90 F.R.D. 49 (S.D. Fla. 1981); 5 Moore's Federal Practice 41.06-1 at pp. 41-88. Investors cites *Harvey Aluminum, Inc. v. American Cyanamid Co.*, 203 F.2d 105, 108 (2nd Cir. 1953), as support for its argument, but this case has been heavily criticized and the Second Circuit has recently noted that the holding in *Harvey* is now against the weight of authority. *Wakefield v. Northern Telcom, Inc.*, 769 F.2d 109, 114 n.4 (2nd Cir. 1985).

A fourth issue arises as to whether equity disallows the use of the "two dismissal" rule even if Investors' actions were "voluntary" dismissals of "actions". Investors argues that it is error to apply Rule 41(a)(1) when the purpose of the Rule would not be served. "There are circumstances when due regard for the underlying policy concerns of the Rule may require that the court depart from the precise language of the Rule." *Sutton Place Dev. Co. v. Abacus Mortg. Inv. Co.*, 826 F.2d 637, 640 (7th Cir. 1987). The court went on to say that "the purpose of the 'two dismissal' rule, 'pointed out in numerous decisions, is to prevent unreasonable abuse and harassment,' " (citation). *Id.* See also *Poloron Prod., Inc. v. Lybrand Ross Bros. & Montgomery*, 534 F.2d 1012, 1017 (1976).

However, in the *Poloron* case the first dismissal was by stipulation. The court noted that the harsh result of the "two dismissal" rule should be avoided since dismissal by stipulation was a mutual agreement and the danger of the abuses listed above was significantly diminished. In *Merrill Lynch, Pierce, Fenner & Smith v. Randall*, 110 F.R.D.

499 (E.D. Cal. 1986), a party made two voluntary dismissals against the same opponent. That party contended that the "two dismissal" rule should not apply because it had no intent to "harass" its opponent. The court held otherwise.

> Rule 41(a)(1) requires no such findings. The disputed issues of fact identified by the Randalls are not material. The application of Rule 41(a)(1) is purely a question of law. . . .
>
> The court has found no case mitigating the effect of Rule 41(a)(1) in a case where there have been two successful unilateral voluntary dismissals. *Id.* at 500.

The court stated that the proper remedy was for the party to move to vacate the second dismissal rather than make a third attempt to litigate the claim. *Id.*

The final issue is whether Investors' decision to dismiss the Trans defendants can be vacated under Fed. R. Civ. P. 60(b)(6). In discussing whether to apply Rule 60(b) the court in *Rodgers v. Watt*, 722 F.2d 456, 459 (9th Cir. 1983), stated:

> It is well settled that the Federal Rules of Civil Procedure are to be liberally construed to effectuate the general purpose of seeing that the cases are tried on the merits and to dispense with technical procedural problems. (Citation).

In spite of the liberal policy towards applying Rule 60(b), the Supreme Court held that if one made a "free, calculated, deliberate" strategic decision there would be no relief by use of Rule 60(b). *Ackerman v. United States*, 340 U.S. 193, 198 (1950). The Court noted that "Petitioner cannot be relieved of such a choice because hindsight

seems to indicate to him that his decision not to appeal was probably wrong . . . " *Id.*

In the context of Rule 41(a) (1) dismissals, the term "voluntary" has been held not to be synonymous with "free, calculated, and deliberate" as used in *Ackerman*. *Randall v. Merrill Lynch*, 820 F.2d 1317, 1321 (D.C. Cir. 1987). In that case, Randall voluntarily dismissed two actions against Merrill Lynch. The second action was dismissed because of Randall's ill-health and inability to travel across country to participate in the suit. Randall was fully aware of the "two dismissal" rule. The court found that although Randall's decision was "voluntary" it was not "free, calculated, and deliberate", so as to preclude relief under Rule 60(b)(6).

In the case at bar, Investors offers reasons for each dismissal. The dismissals are definitely voluntary and are questionably within the realm of "free, calculated, and deliberate". The initial dismissal was mandated by Nevada law regarding corporations not registered to do business in Nevada. The second dismissal was executed because Investors did not want to challenge the title to the property in question. This allowed the transaction between Pacific and the Trans defendants to be completed. On the face of it, this second dismissal appears to be the "free, calculated, and deliberate" strategic decision discussed in *Ackerman*. Investors chose to sue for damages rather than injunctive relief as initially sought.

This motion, discussed in the light most favorable to Investors, is granted. Investors' two previous dismissals were voluntary. Further, Rule 41(a)(1) can be used to dismiss less than all of the defendants. With respect to the

equitable argument, the District Court in *Randall* held that the intent of the dismissing party did not matter when the dismissals were the unilateral actions of that party. Finally, Investors' decision to dismiss Transcontinental the second time is that type of strategic move which is "free, calculated, and deliberate" of which Rule 60(b) offers no relief.

IT IS ORDERED

This 26 day of October, 1988.

/s/ Roger Foley
DISTRICT JUDGE

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

LAKE AT LAS VEGAS INVESTORS GROUP, INC., Plaintiff, vs. PACIFIC MALIBU DEVELOPMENT CORPORATION, et. al., Defendants.	CASE NO. CV-S-87-768 RDF ORDER DENYING MOTION TO RECONSIDER (Entered March 30, 1989)

INTRODUCTION

This order concerns plaintiff's LAKE AT LAS VEGAS INVESTORS GROUP, INC. ("Investors") motion for reconsideration of this court's order granting Defendants' TRANSCONTINENTAL CORPORATION, TRANSNEVA CORPORATION, and TRANSNEVA LIMITED PARTNERSHIP ("Trans defendants") motion to dismiss. (See Plaintiff's motion, Document No. 90 and this court's order, Document No. 86). The court's order to dismiss was based upon the "two-dismissal" rule of Fed. R. Civ. P. 41(a)(1).

DISCUSSION

Investors allege that this court's order dismissing the Trans defendants based upon the "two dismissal" rule was "demonstrably erroneous." After a thorough review of the record, this court disagrees with Investors' analysis and accordingly denies its motion for reconsideration.

Investors first argues that the initial filing of the action in the Nevada State Court was a nullity. Investors bases this argument on N.R.S. 80.210(1) which prevents an unregistered corporation from commencing, maintaining or defending actions until such time that it becomes registered. Plaintiff argues that, based upon N.R.S. 80.210(1), the first action filed by Investors in Nevada State Court should be treated as if it never occurred. Plaintiff fails to cite one case which supports this theory. In fact, one case cited by Plaintiff, which states that a complaint filed by an unregistered corporation must be dismissed, specifically referred to that complaint as a "commencement of the suit." *Pettit v. Management Guidance, Inc.*, 95 Nev. 834, 835 (1979). Further, in a second case cited by Investors, *Atlantic Commercial v. Boyles*, 103 Nev. 35 (1987) the Nevada Supreme Court again referred to the "commenced" action where the complaint was brought by an unregistered corporation. Plaintiff's "nullity" argument is itself a nullity.

Investors next argues that the notice of dismissal that it issued in the Nevada State Court was not "voluntary" as required for imposition of the "two-dismissal" rule. This court is not convinced by Investors' argument.

Plaintiff relies mainly on two cases to support this argument. First, Investors states, citing from *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973), that there is "no talismanic definition of 'voluntariness,' mechanically applicable to the host of situations where the question has arisen." Plaintiff's reliance on *Schneckloth* is ill-founded. The Court in that case was referring to voluntary consent in criminal search and seizure situations. This court does not see the relation of the above to the case at bar in

which counsel for Investors sought, of their own volition, to issue a notice of dismissal in a civil case.

Further, counsel had other options open to them to gain the same result (dismissal without prejudice) without endangering their client to the harshness of the "two-dismissal" rule. Counsel could just as easily have sought dismissal without prejudice under N.R.C.P. 41(a)(2). Investors claims that it had only one option – to file a notice dismissal under Rule 41(a)(1). This is evidently not so.

It is not this court's duty to fix all harms done to a plaintiff by counsel's actions. In *Engelhardt v. Bell & Howell Company*, 299 F.2d 480, 485 (8th Cir. 1962) the court stated:

> To assert that plaintiff's counsel may have been ignorant of the two dismissal rule and the effect thereof, and that therefore plaintiff should be relieved of the effects is but to argue that an attorney has no authority to try a case incorrectly and that if he does, then his client is not bound by the result and should be excused from its consequences. The argument, in effect, is that there should be no rules if the violation of them results in the inability of a party to exercise substantive rights. Such contention is, of course, unsound.

Plaintiff further relies on *Hiles Co. v. Johnston Pump Co. of Pasadena*, 93 Nev. 73 (1977). In this case, the Nevada Supreme Court noted that a stipulation made by the plaintiff and the defendant to dismiss an action without prejudice was not voluntary. In that case, the trial court had denied the plaintiff's motion to join indispensable

parties. Counsel was left to dismiss the case so as to avoid an adverse ruling on the merits. In this case, Investors did not face an adverse ruling on the merits. As stated above, Investors could have sought a dismissal by order of the court thereby avoiding the effects of the "two-dismissal" rule. This court need not, and does not, inquire as to why counsel sought dismissal by notice.

CONCLUSION

This court is not persuaded by Plaintiff's arguments requesting this court to reconsider its past order. This court relies on its past ruling which holds that Investors' first dismissal of the Trans defendants in the Nevada State Court was voluntary and, thus, triggered the result mandated by Rule 40(a)(1), i.e. the "two-dismissal" rule. Plaintiff's motion for reconsideration is denied.

DATED: March 30th 1989

/s/ Roger Foley
DISTRICT JUDGE

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

LAKE AT LAS VEGAS INVESTORS GROUP, INC., Plaintiff/Appellant, v. PACIFIC MALIBU DEVELOPMENT CORP., et al., Defendants, TRANSCONTINENTAL CORP., TRANSNEVA CORP., and TRANSNEVA LIMITED PARTNERSHIP, Appellees.	CA No. 89-16496 DC No. CV-S-87-768-RDF (Nevada) ORDER (Filed Dec. 2, 1991)

Before: TANG, FARRIS, and D. W. NELSON, Circuit Judges.

The panel as constituted in the above case has voted to deny the petition for rehearing and to reject the suggestion for a rehearing en banc.

The full court has been advised of the suggestion for an en banc hearing, and no judge of the court has requested a vote on it. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

Supreme Court, U.S.
FILED
FEB 18 1992
OFFICE OF THE CLERK

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No. 91-1192

In The

Supreme Court of the United States

October Term, 1991

LAKE AT LAS VEGAS INVESTORS GROUP, INC.,

Petitioner,

v.

TRANSCONTINENTAL CORPORATION, TRANSNEVA CORPORATION and TRANSNEVA LIMITED PARTNERSHIP,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Appeals For The Ninth Circuit

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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COURT RULES

Fed. R. Civ. P. 41(a)(1) ..... *passim*

Nev. R. Civ. P. 41(a)(1) 3

I. SUMMARY OF ARGUMENT

Fed. R. Civ. P. 41(a)(1) permits a party to voluntarily dismiss any claim once on its own initiative without penalty, as long as no answer or motion for summary judgment has been filed by the adverse party. A second dismissal of the same claim, however, is treated as a judgment on the merits. The rule states:

> Unless otherwise stated in the notice of dismissal or stipulation, the dismissal is without prejudice, except that *a notice of dismissal operates as an adjudication upon the merits when filed by a plaintiff who has once dismissed* in any court of the United States or of any state *an action based on or including the same claim.*

Fed. R. Civ. P. 41(a)(1) (emphasis added). Because the second dismissal is "upon the merits," under the doctrine of res judicata or claim preclusion it operates as a bar to further suits based on the same claim. *Gioia v. Blue Cross Hospital Service, Inc. of Missouri*, 641 F.2d 540 (8th Cir. 1981); *Engelhardt v. Bell & Howell Company*, 299 F.2d 480 (8th Cir. 1962).

Petitioner Lake at Las Vegas Investors, Inc. ("Investors") has attempted to fit this case within the criteria for granting certiorari by manufacturing an illusory split between the circuits as to whether a defendant must demonstrate plaintiff's intent to abuse or harass before obtaining dismissal based on the two-dismissal rule. In this case, the Ninth Circuit held intent irrelevant where the plaintiff has filed two unilateral voluntary dismissals under Rule 41(a)(1). No circuit has held otherwise.

Investors also asserts this case presents the issue of whether state or federal res judicata (claim preclusion) law applies in diversity cases. However, Investors delayed raising that issue until filing its motion to reconsider the Ninth Circuit decision. Since the briefs did not squarely present the issue, the Ninth Circuit did not definitively choose between state and federal law. Moreover, the Ninth Circuit decision is consistent with Nevada state law, as well as federal law.

Similarly, in the district court Transneva Corporation and Transneva Limited Partnership (the "Transneva Defendants") argued claim preclusion did not require mutuality of privity and the Transneva Defendants were in privity with the twice-dismissed Transcontinental Corporation ("Transcontinental") in any event. *Investors failed to contest or argue the point in the district court.* Although Investors argued the privity issue before the Ninth Circuit, the amended opinion filed August 23, 1991, did not decide whether privity existed, because it held Transcontinental and the Transneva Defendants were "substantially the same" for purposes of Rule 41(a)(1).

Investors' failure to properly raise these matters below has left this case with ambiguities and factual issues which render it inappropriate for advancing uniformity of the law.

II. ARGUMENT

A. There Is No Split Among The Circuits Regarding Intent To Harass Under Fed. R. Civ. P. 41(a)(1)

On its face, Rule 41(a)(1) contains no "intent to harass" limitation on the provision which renders a second voluntary dismissal "upon the merits." In this case, Investors filed two voluntary "Notices of Dismissal," one pursuant to Nev. R. Civ. P. 41(a)(1) and one pursuant to Fed. R. Civ. P. 41(a)(1). The Ninth Circuit held intent inconsequential when the plaintiff files two such unilateral voluntary dismissals. *Lake at Las Vegas Investors, Group, Inc. v. Pacific Malibu Development Corp.*, 933 F.2d 724, 727 (9th Cir. 1991) (Pet. App. 13, 22-23).

Poloron Products, Inc. v. Lybrand Ross Bros. & Montgomery, 534 F.2d 1012 (2d Cir. 1976) does not hold otherwise. In *Poloron*, the parties first dismissed by stipulation. Although Rule 41(a)(1) contains no distinction between a first dismissal by stipulation or by notice, the court held it would not invoke the rule in the case of a stipulated first dismissal, stating:

> The danger of such abuse [of the unilateral right to dismiss an action] diminishes, however, where the first dismissal is by stipulation. A dismissal by stipulation is not a unilateral act on the part of the plaintiff but rather is a mutual agreement by all the parties.

534 F.2d at 1017. Since this case involved two *unilateral* voluntary dismissals, the Ninth Circuit held the limited exception to the two-dismissal rule recognized in *Poloron* did not apply. No circuit court has grafted an intent to

harass requirement onto the rule in a case involving two unilateral voluntary dismissals.[1] This Court should deny certiorari because no split among the circuits exists on the intent issue in these circumstances.

B. Investors Failed To Properly Raise The Issue Of Whether State Or Federal Claim Preclusion Law Applied In A Diversity Action

Investors now urges this Court to decide whether state or federal claim preclusion law applies in diversity cases. However, Investors did not argue this issue either in the district court or in its briefs before the Ninth Circuit. Investors *first* raised the issue in a Petition for Rehearing and Suggestion for Rehearing En Banc before the Ninth Circuit, filed on May 24, 1991.

In its opinion, the Ninth Circuit did not indicate whether it applied state or federal law on this point (Pet. App. 23-24). Given the dearth of claim preclusion law concerning mutuality of privity and Rule 41(a)(1)

---

[1] Although Investors' former counsel filed an affidavit declaring no intent to harass, it was uncontradicted only because the district court never needed to reach the "harassment" issue. Investors' reason for the second dismissal is a matter of record, explained in its motion to amend filed immediately thereafter. Motion to Amend Complaint (Resp. App. 1). Investors dismissed Transcontinental so the real estate transaction between Transcontinental and Pacific Malibu Development Corporation would close. In effect, it induced Transcontinental to close the deal so it could sue Transcontinental. It would be difficult to imagine a less appropriate motive for a voluntary dismissal or a circumstance in which a defendant has suffered more harm by reason of the dismissal.

dismissals, the Ninth Circuit cited a North Carolina state case, *City of Raleigh v. College Campus Apartments, Inc.*, 94 N.C. App. 280, 380 S.E.2d 163 (1989), in concluding Transcontinental and the Transneva Defendants were "substantially the same" for purposes of Rule 41(a)(1). One cannot tell whether the Ninth Circuit determined the Nevada Supreme Court would likely adopt the "substantially the same" test or whether the court simply applied it as a matter of federal law. Thus, the writ should be denied because there is substantial uncertainty as to what the court below decided, and the issue petitioner seeks to raise might not have made any difference in the result in any case.

Citing *Paradise Palms Community Association v. Paradise Homes*, 89 Nev. 27, 505 P.2d 596, *cert. denied*, 414 U.S. 865 (1973), Investors decries the alleged failure to apply state law as if it would lead to a contrary result. Such is not the case. In *Paradise Palms*, the Nevada Supreme Court rejected mutuality of privity as a condition for pleas of prior adjudication, adopting the test first set forth in *Bernhard v. Bank of America Nat. Trust & Sav. Ass'n.*, 19 Cal.2d 807, 122 P.2d 892 (1942), and quoting *Bernhard* as follows:

> In determining the validity of a plea of *res judicata* three questions are pertinent: Was the issue decided in the prior adjudication identical with the one presented in the action in question? Was there a final judgment on the merits? Was the party *against* whom the plea is asserted a party or in privity with a party to the prior adjudication?

505 P.2d at 599. (Emphasis added). The Nevada Supreme Court then concluded:

> [*Bernhard*] is *equally* applicable to the doctrine of collateral estoppel. [Citations omitted.] We approve the *Bernhard* decision for Nevada.

Id. (Emphasis added.) Surely the Ninth Circuit could have concluded the Nevada Supreme Court would not require mutuality of privity for assertion of claim preclusion after having cited with approval *Bernhard v. Bank of America Nat. Trust & Sav. Ass'n., supra,* for the proposition that res judicata did not require mutuality of privity.[2] The petition should be denied because it would require the Court to decide this tangential state law issue.

C. Investors Failed To Contest Assertions Of Privity Between Transcontinental And The Transneva Defendants In The District Court

In the district court, the Transneva Defendants asserted privity between them and Transcontinental, and Investors neither contested nor argued the point. In dismissing appellees, the district court observed:

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[2] Investors disingenuously cites *Marine Midland Bank v. Monroe,* 104 Nev. 307, 756 P.2d 1193 (1988) to suggest Nevada requires privity among those asserting claim preclusion. In *Marine Midland,* the court cited *Paradise Palms* with approval, and the case involved an attempt to assert issue preclusion *against* a bank which was neither a party nor in privity with a party to a prior action. In this case, the newly added defendants asserted claim preclusion against Investors, the *plaintiff* in *both* prior actions.

> The Trans defendants allege contractual privity among themselves. Investors fails to contest this argument. Defendants' argument appears to be sound since Transneva Corporation is wholly owned by Transcontinental, and Transneva Corporation is the general partner of Transneva Limited Partnership. Therefore, the *res judicata* argument should apply to all three defendants.

(Pet. App. 30).

Moreover, the Ninth Circuit did *not* ultimately find privity absent between Transcontinental and the Transneva Defendants. Investors first argued Rule 41(a)(1) required mutuality of privity before the Ninth Circuit, but the court found "the argument for a strict privity requirement inapplicable here." In its original opinion, the court stated, "Privity, in its traditional sense, is absent,. . . . " However, the court's order and amended opinion entered on August 23, 1991, deleted the above language because the court concluded the defendants were "substantially the same." (Pet. App. 13). Thus, the Ninth Circuit finally made no definitive determination regarding privity.

Investors argues Nevada law determines the definition of privity in this case, thus presenting another state law issue without fully developed facts and with extremely limited application to the uniformity of federal law among the circuits. The Court should decline this diversion through Nevada law.

III. CONCLUSION

The lack of a genuine split among the circuits in interpretation of Fed. R. Civ. P. 41(a)(1), uncertainty concerning what claim preclusion law the Ninth Circuit applied, and the presence of state law issues that might well make the choice of law issue meaningless, render this case an inappropriate vehicle for establishing the law. The petition for writ of certiorari should be denied.

Respectfully submitted,

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ATTORNEYS FOR PLAINTIFF

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

LAKE AT LAS VEGAS INVESTORS GROUP, INC., a Delaware corporation, Plaintiff, vs. PACIFIC MALIBU DEVELOPMENT CORPORATION, a California corporation; BARRY SILVERTON, an individual; TRANSCONTINENTAL CORPORATION, a California corporation; DOES I-X, inclusive. Defendants.	CASE NO. CV-S-87-768-RDF MOTION TO AMEND COMPLAINT

COMES NOW Plaintiff LAKE AT LAS VEGAS INVESTORS GROUP, INC. ("INVESTORS"), by and through its attorneys of record, Jones, Jones, Close & Brown, Chartered, and hereby moves this Honorable Court for an Order permitting said Plaintiff to amend its Complaint on file herein.

This Motion is based upon Fed. R. Civ. P. 15(a), the following Points and Authorities, and all pleadings and papers on file herein.

DATED this 10th day of November, 1987.

JONES, JONES, CLOSE
& BROWN, CHARTERED

By /s/ Kevin R. Stolworthy
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POINTS AND AUTHORITIES

I.

STATEMENT OF THE FACTS

On October 15, 1987, Plaintiff filed its Complaint in District Court, Clark County, Nevada. On October 16, 1987, Plaintiff filed its Amended Complaint and sued PACIFIC MALIBU DEVELOPMENT CORPORATION ("PACIFIC MALIBU"), a California corporation, and withdrew its suit against Pacific Malibu Development Corporation, a Nevada corporation. On October 22, 1987, Defendant PACIFIC MALIBU petitioned for removal to the United States District Court. Defendant PACIFIC MALIBU'S petition was granted.

Plaintiff INVESTORS now files this Motion to Amend Complaint in order to withdraw all of its causes of action against Transcontinental Corporation and to delete its causes of action of specific performance, declaratory

relief and its request for a temporary restraining order, preliminary injunction and/or permanent injunction against all of the Defendants. Plaintiff seeks to add the causes of action of misrepresentation or negligent misrepresentation against PACIFIC MALIBU and BARRY SILVERTON.

II.

ARGUMENT

Fed. R. Civ. P. 15(a) provides the following:

> Amendments. A party may amend the party's pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, the party may so amend it at any time within 20 days after it is served. *Otherwise a party may amend the party's pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires.* A party shall plead in response to an amended pleading within the time remaining for response to the original pleading or within 10 days after service of the amended pleading, whichever period may be the longer, unless the court otherwise orders. (Emphasis supplied)

Professor Moore has noted that amendments are to be very liberally granted under Rule 15(a) stating that:

> *The courts have shown "a strong liberality . . . in allowing amendments under Rule 15(a)."* And in Foman v. Davis the Supreme Court strongly reaffirmed the mandate of Rule 15(a)

that leave to amend shall be "freely given when justice so required."

> Recognizing that the entire spirit of the rules is to the effect that controversies shall be decided on the merits, the courts have not been hesitate to allow amendments for the purpose of presenting the real issues of the case, where the moving party has not been guilty of bad faith and is not acting for the purpose of delay, the opposing party will not be unduly prejudiced, and the trial of the issues will not be unduly delayed.
>
> * * *
>
> The fact that an amendment involves a departure from the facts previously alleged is no bar to its allowance, since consistence in pleadings is not required.
>
> The Rule applied equally to plaintiffs and defendants and leave to amend may be sought for any purpose relating to the pleadings. The clearest cases for leave to amend are correction of an insufficient claim or defense and amplification of previously alleged claims for defenses.
>
> *Leave may also be sought to add, substitute, or drop parties.* 3 Moore's Federal Practice, ¶ 15.08. (Emphasis supplied)

A noteworthy example showing a strong liberality in allowing amendments under Rule 15(a) is the decision by the United States Supreme Court in *Foman v. Davis*, 371 U.S. 178, 83 S.Ct. 227, 9 L.Ed. 2d 222 (1962), wherein the court held that the trial court should have granted plaintiff's motion to vacate a judgment and amend the complaint because "the amendment would have done no

more than state an alternate theory for recovery." 371 U.S. at 182. The *Foman* court said the following:

> *Rule 15(a) declares that leave to amend "shall be freely given when justice so requires;" this mandate is to be heeded.* 3 Moore, Federal Practice (2d ed 1948), ¶¶ 15.08, 15.10. If the underlying facts or circumstances relied upon by a plaintiff may be a proper subject of relief, he ought to be afforded an opportunity to test his claim on the merits. In the absence of any apparent or declared reason – such as undue delay, bad faith, or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc. – *the leave sought should, as the rules require be "freely given."* (Emphasis supplied) *Id.*

Hence, in light of all these authorities, it is clear that leave to amend pleadings should be readily granted. Accordingly, Plaintiff submits that the instant Motion to Amend the Complaint should be granted by this Court.

The purpose of this amendment is to remove any allegation which would prohibit or restrict the Defendants PACIFIC MALIBU and BARRY SILVERTON from selling, assigning or transferring any right or interest they might have in any real property, options rights or permits which are subject to an agreement dated September 4, 1987 (hereafter referred to as "Agreement"). The Plaintiff has heretofore entered a notice of dismissal as to Transcontinental Corporation. (A copy of that notice is attached hereto as Exhibit "A".) The Defendant PACIFIC MALIBU has alleged that it has a possible and pending

sale of the real property, options rights or permits and has alleged that the Plaintiff's First Amended Complaint has interfered with that potential transaction. In order to avoid any hindrance of the proposed sale of real property, option rights or permits, the Plaintiff desires to further amend this complaint. (A copy of the proposed Second Amended Complaint is attached hereto as Exhibit "B".) Accordingly, the leave sought by Plaintiff should as the rule requires, be freely given.

For all of the foregoing reasons, Plaintiff respectfully requests that this Court grant its Motion to Amend Complaint.

DATED this 10th day of November, 1987.

JONES, JONES, CLOSE
& BROWN, CHARTERED

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Supreme Court, U.S.
FILED
MAR 5 1992
OFFICE OF THE CLERK

No. 91-1192

In The

Supreme Court of the United States

October Term, 1991

LAKE AT LAS VEGAS INVESTORS GROUP, INC.,

Petitioner,

v.

TRANSCONTINENTAL CORPORATION, TRANSNEVA CORPORATION and TRANSNEVA LIMITED PARTNERSHIP,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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REPLY ARGUMENT

I. Respondents' Contention That There Is No Split Among The Circuits On The Interpretation And Application Of The "Two Dismissal Exception" Of Federal Rule Of Civil Procedure 41(a)(1) Is Erroneous.

Respondents acknowledge that the "two dismissal exception" of Rule 41(a)(1) "contains no distinction between a first dismissal by stipulation or notice", but then inconsistently argue that because the first dismissal in *Poloron*[1] was by stipulation while the first dismissal here was by notice there is no conflict between the Ninth Circuit decision herein and the Second Circuit's decision in *Poloron*. (Respondents' Br., p. 3).

The Ninth Circuit held that the draconian sanction of the "two dismissal exception," which indisputably was designed to deter harassment of defendants by the filing and voluntary dismissal of successive actions based on the same claim, must be mechanically applied whether or not application served the purpose of the "exception" in the case presented. In direct contrast, the Second Circuit in *Poloron* (534 F.2d at 1017) held:

> *Where the purpose behind the "two dismissal" exception would not appear to be served by its literal application,* and where that application's effect would be to close the courthouse doors to an otherwise proper litigant, a court should be most careful not to construe or apply the exception too broadly. (Emphasis added.)

A clear conflict exists between the Second Circuit's holding that application of the "exception" is not mandatory if the policy of the "exception" would not be

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[1] *Poloron Products, Inc. v. Lybrand Ross Bros. & Montgomery,* 534 F.2d 1012 (2d Cir. 1976).

served, and the Ninth Circuit's holding mandating literal application of the "exception".[2]

II. Respondents Attempt To Avoid The Split Among The Circuits On The Application Of The *Erie* Doctrine To Res Judicata.

Respondents do not dispute the existence of a widespread split among the Circuits over whether state or federal law governs res judicata in a diversity action.[3]

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[2] As in *Poloron*, the first dismissal in this case, while not by stipulation, also was not a voluntary unilateral act. The uncontradicted affidavit filed below by Investors' former counsel confirmed that the first dismissal was filed because he believed it was compelled by Nevada law.

[3] Respondents misleadingly claim that Investors did not argue this issue either in the district court or in its briefs before the Ninth Circuit. Until the Ninth Circuit Panel issued its original Opinion, there was no dispute that state law governed that issue in this diversity action. Ninth Circuit law had always so held. *E.g., Washington Public Power Supply System v. Pittsburgh Des Moines Corp.*, 876 F.2d 690, 699 (9th Cir. 1989); *Gramm v. Lincoln*, 257 F.2d 250, 255 n.6 (9th Cir. 1958). In the district court, both parties acknowledged that state law governed by citing only Nevada law. In a subsequent motion in the district court addressing the identical issue, respondents made the point express:

> In a diversity case, this court must apply the claim preclusion law of the state in which it sits. *Constantini v. Trans World Airlines*, 681 F.2d 1199 (9th Cir. 1982); *St. Paul Fire & Marine Ins. Co. v. Weiner*, 606 F.2d 864 (9th Cir. 1979). The rule applies even when the prior action was in federal court. *Constantini v. Trans World Airlines, supra*. This Court must apply the claims preclusion law of Nevada.

Investors' brief to the Ninth Circuit cited diversity as the basis for federal jurisdiction and Nevada law that a judgment is res judicata as to the parties and their privies. It was not until the Ninth Circuit Panel issued its original Opinion applying federal law that the

(Continued on following page)

Instead, seeking to side-step the clear need for this Court's guidance to settle the confusion and split among the Circuits on the application of the *Erie* doctrine to res judicata, and with an unfortunate lack of candor, respondents speciously claim (at p. 5) that there is uncertainty in the Ninth Circuit's Opinion in that "[o]ne cannot tell whether the Ninth Circuit determined the Nevada Supreme Court would likely adopt the 'substantially the same' test or whether the court simply applied it as a matter of federal law." *No such uncertainty exists.* In its original Opinion, the Ninth Circuit first noted that "Investors argues that privity is required" (A-10), a point on which Investors' brief cited only Nevada law. But, ignoring Nevada law, and citing only a treatise on *federal* practice, the Ninth Circuit held:

> *[W]e* reject the argument for a strict privity requirement. Nevertheless, *we* agree with Investors that the weight of authority requires at least a relationship between the dismissed party and the party seeking to claim the benefit of the bar.[4] . . .
>
> *Privity, in its traditional sense, is absent,* but the relationship between Transcontinental and the two Transneva defendants is substantial. . . . *We* need not define the precise parameters of the applicable test. ***We hold*** only that the wholly-owned subsidiary and the partnership in which that subsidiary is the general partner may invoke the rights of the subsidiary's parent for purposes of Rule 41(a)(1) res judicata. (A-10 - A-11) (emphasis added.)

(Continued from previous page)

issue first arose, and Investors immediately filed its Petition for Rehearing properly raising the issue. When the Panel's Amended Opinion did not address or correct its error, a Renewed Petition for Rehearing was filed.

[4] Contrary to the Ninth Circuit's statement, Investors contended only that Nevada law required privity, not that "a relationship" was necessary.

In its Amended Opinion, the Ninth Circuit merely substituted a conclusion that the relationship between Transcontinental and the Transneva Defendants is "substantially the same" instead of "is substantial". (A-24) The Ninth Circuit did not even mention Nevada law or a single Nevada case on the issue of res judicata, but simply created a res judicata test as a matter of federal law.[5]

Respondents' claim (at pp. 5-6) that granting a writ of certiorari would require this Court to decide an issue of state law is similarly erroneous and disingenuous. Contrary to Respondents' assertion, the Nevada Supreme Court in *Paradise Palms*[6] did not cite *Bernhard v. Bank of America Nat. Trust & Sav. Ass'n*[7] "for the proposition that *res judicata* did not require mutuality of privity". (Emphasis added.) Even a cursory review reveals that both *Paradise Palms* and *Bernhard* were collateral estoppel (issue preclusion) cases, *not* res judicata (claims preclusion)

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[5] In Point C of their Brief (at pp. 6-7), Respondents acknowledge that the Ninth Circuit's original Opinion found privity lacking between Transcontinental and the Transneva Defendants, but argue that the Ninth Circuit ultimately made no definitive determination regarding privity because its Amended Opinion deleted that finding and concluded that Transcontinental and Transneva Defendants were "substantially the same." However, as was set forth at pages 13-14 of Investors' Petition concerning the Ninth Circuit's erroneous application of federal law, the Ninth Circuit's use of a "substantially the same" test also conflicts with established Nevada law, so that cosmetic attempt to correct its disregard of the *Erie* doctrine without changing the result only substituted one contravention of the *Erie* doctrine for another.

[6] *Paradise Palms Community Association v. Paradise Homes*, 89 Nev. 27, 505 P.2d 596, *cert. denied*, 414 U.S. 865 (1983).

[7] 19 Cal.2d 807, 122 P.2d 892 (1942).

cases.[8] As set forth in Investors' Petition for Writ of Certiorari (at pp. 13 and 17-22), while mutuality of privity has been eliminated as a condition of applying collateral estoppel to nonparties, neither Nevada nor federal law has eliminated mutuality of privity as a requirement of res judicata (claims preclusion), and to do so would conflict with due process rights.

III. Respondents Do Not Address The Conflict Between The Ninth Circuit Decision And Federal And Constitutional Law.

In Part III of the instant Petition, Investors show that if *federal* law governs res judicata in a diversity action, the Ninth Circuit's decision conflicts with decisions of this Court, federal policy and Investors' due process rights. Respondents' Brief fails to refute the need for resolution of these important federal and constitutional issues.

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[8] Many opinions loosely use the term "res judicata" to refer either to issue preclusion or to claims preclusion. *Bernhard* used the term "res judicata" in reference to issue preclusion (collateral estoppel).